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No. 1678

IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

VAN C. VOLLMER, and THE INDIANA INVESTOR AND BUSINESS NEWS, INC., *Petitioners*,

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO THE OPPOSITION MEMORANDUM OF THE UNITED STATES

JOHN D. RAIKOS
120 E. Market Street, Suite 933
Indianapolis, Indiana, 46204
Telephone (317) 632-5358
Counsel for Petitioner

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1. The contention of the Government that petitioner Vollmer *knowingly* published false and misleading reports and editorial comments and failed to disclose receipt of consideration, will not find support in the record.

Neither the argument of the Solicitor General, nor obiter dicta of the Court of Appeals may be substituted for *evidence* of guilty knowledge on the part of Vollmer. Furthermore, the petitioner Vollmer received no consideration whatever. The cancelled checks show on their face that payment was made to the *corporate* petitioner, not the petitioner Vollmer. No part of the money paid to the corporate peti-

tioner found its way directly, or indirectly, to Vollmer. Mr. Gilbert VanHorn, defendant, and witness for the Government so testified. (Tr. Vol. V. pp. 869-870):

"920 Q. At the back of this, is there an endorsement as to where that money went?

A. Yes. It was deposited by the Indiana Investor to American Fletcher Bank.

921 Q. Indiana Investor, Inc. It wasn't deposited by Mr. Vollmer?

A. No. No, it was deposited by the Indiana Investor."

The Solicitor General urges that the subscription cost of approximately $1,000.00 to $1,200.00 relied upon by The Court of Appeals at pp. 18a-19a of its opinion was established by argument of Government counsel and not the evidence, whose argument *overstated* the Government's case and proved by *argument* what could not possibly be proved by *evidence.* Such argument would now deprive petitioner Vollmer up to three (3) years of his life for a crime he did not commit. Although the evidence *did show,* as contended by the Solicitor General and relied upon by the Court of Appeals, that of the $2,500.00 paid by Robert Chappell, the sum of $1,000.00 to $1,200.00 was for the *cost of subscriptions,* this premise of itself does not support the conclusion by the Solicitor General or the Court of Appeals that petitioner Vollmer *profited* by the difference. While $1,200.00 was paid for subscriptions, such did not include the *cost of handling and postage* for a *"special mailing"* which the *uncontroverted* evidence showed consumed all of the money received by the corporate petitioner. The entire amount of $2,500.00 was in consideration for and payment for subscriptions, mailing and special handling. There was no consideration paid or received for the publication of any article.

The Solicitor General argues that petitioner Vollmer's conviction is supported under 15 U. S. C. q (a), but fails to show what *evidence,* and there was none, which can be relied upon as proof of the essential elements of the crime not only that Vollmer *knew* that the stories and comments were

false and misleading, but in addition that he *knowingly* published the same.

Dunn v. *United States,* 284 US 390, cited by the Solicitor General is inapplicable since the indictment here was challenged in the court below for multiciplicity in charging scheme *and* conspiracy. In this cause all of the essential elements of the conspiracy were included in the substantive crimes. An acquittal of the charge of conspiracy will not support a judgment of guilt on the charge of a scheme by the same person. The scheme count and the conspiracy count were identical. The conspiracy count of the indictment, Count 41, alleged the identical overt acts which were alleged in the substantive counts and there is nothing in the substantive counts that is not included in the conspiracy count, or vice versa.

2. Unlike *Curtis Publishing Company* v. *Butts,* 388 US 130, rules of law affecting private litigants in a tort action for damages cannot be applied in a criminal prosecution. The standard of care in tort cases as decided by *Butts* may involve reckless disregard and negligence for the truth by a *preponderance* of the evidence which may not be equated to the due process requirements of "reasonable doubt" and criminal "mens rea," necessary to deprive petitioner Vollmer of his liberty.

The Government's evidence by Mr. VanHorn established that petitioner Vollmer was publishing a newspaper in an intra-state environment. (Tr. Vol. V, p. 872):

> "929 Q. . . . you were asked if you knew how Mr. Vollmer got his information. I will ask you if it isn't a fact that you said: "He buzzes for news all the time, everybody, I think, and goes around to all the different plants and businesses in Indiana and so forth, and just compiles it that way." Was that your testimony?
>
> A. I believe it is."

and the material was obtained from many sources. (Tr. Vol. V. p. 874):

"938 Q. Where did he get the material that he published? Did he make it up?

A. He would have gotten, I would imagine, part of it from myself, part of it from Mr. Olsen, part of it from Mr. Mayne, part of it from Air & Space.

939 Q. And, then, he would write it in the form of a newspaper report?

A. Right."

and that the corporate petitioner was publishing a newspaper. (Tr. Vol. V. pp. 864, 865):

"892 Q. . . . Now, is it your testimony that he wrote stories himself, or that he had an editorial staff or that he was running a newspaper? What did you intend to convey?

A. Well, I intended to convey that he run a newspaper, and I think most of the editorials and most of the news service, I believe, was written by Mr. Vollmer."

* * *

"898 Q. Were you also aware that there was an editorial staff in connection with the paper? . . .

A. Yes, I believe he had a staff.

* * *

899 A. I don't rightly know — three or four."

The quid pro quo to the corporate petitioner, if any, was the *obtaining of subscriptions,* not the contents of the articles.

Mr. VanHorn so testified. (Tr. Vol. V, p. 833):

"772 A. . . . So I asked him what favor — if it was something I could do, I would. And he said he needed subscriptions to his newspaper and one way he thought he could increase his circulation was that if I would allow him to write a letter — if I would approve it, and that he would send out to the shareholders of Air & Space and Commercial Capital, asking for subscriptions to his newspaper. I saw nothing wrong with it. I talked it over with Mr. Olsen; he saw nothing wrong with it. We gave him our okay."

Talley v. *California* dealt with the obligations of the State of California under the Fourteenth Amendment *to prevent frauds* by ways *other than* abridging freedom of speech and press. The Fifth Amendment guarantees petitioner Vollmer the right to pursue a legitimate business and to express his views in an orderly fashion without fear of being prosecuted for what he prints and without fear that the elusive tests of the tort law may, as the Government here contends, can be applied to make conduct criminal *without notice.*

3. There is no reason either in fact or in law to sever the case as to Chappell but deny the same right to petitioner Vollmer. Both Chappell and Vollmer were named in identical counts for identical acts under the same indictment. Count 39 charged only Chappell and Vollmer, as individuals, with an offense without disclosing who was being charged as *principal* and who was being charged as *aider* and *abettor.* The overruling of Vollmer's motion for severance, determined as a matter of law by the court that each was *as one* culpable, and the subsequent acquittal of Chappell without now discharging Vollmer amounts to a denial of the fundamental fairness imbodied in due process guaranteed him under the Fifth Amendment. The Government doesn't urge its initial contention with respect to the timely filing under Rule 22 (2) of the Rules of this Court inasmuch as the greater portion of the Solicitor General's argument goes to substance rather that Procedure, nevertheless, the Petition was timely filed in accordance with the rules of the Court of Appeals of the 7th Circuit.

The United States, in its opposing memorandum completely ignores the basis for the holding of this Court in Re *Winship*, 397 US 358, 375. This is evident from the following portions of the Court's opinion, 397 US, at p. 375:

> "Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.
>
> '[7] Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicity hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

while the Government's Memorandum in Opposition, at page 2-3 states:

> "The evidence supporting the conviction under subsection (a) showed that an investor, Mrs. Stech, read about ASU in the Indiana Investor and then obtained Vollmer's advice, after which she made a purchase. While the court below recognized that Vollmer had "made no identifiable affirmative misrepresentation" in his conversation with Mrs. Stech, it determined that the evidence tending to show that Vollmer had knowingly published misleading reports and comments was sufficient in the light of the circumstances to support

> the jury's conclusion that he was a willful "participant in the fraudulent course of conduct which generated the sales to Mrs. Stech, and, indeed, others" . . ."

In light of the inability of the Government to face the issues presented by petitioner Vollmer without grossly distorting the *Winship* decision, the need for plenary review of the action below is undisputable; indeed summary reversal is in order.

Respectfully submitted,

JOHN D. RAIKOS

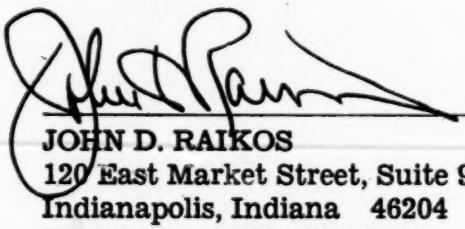
120 East Market Street, Suite 933
Indianapolis, Indiana 46204
Telephone: (317) 632-5358

Counsel for Petitioner,
Van C. Vollmer

PROOF OF SERVICE

The undersigned being first duly sworn upon his oath hereby certifies that prior to the filing of the Reply to the Opposition Memorandum of the United States in forty (40) copies of Petitioner, Van C. Vollmer with the Clerk of the United States Supreme Court, he forwarded five (5) copies thereof, by first class postage prepaid, United States mail, to wit:

Solicitor General,
Department of Justice,
Washington, D. C. 20530



JOHN D. RAIKOS
120 East Market Street, Suite 933
Indianapolis, Indiana 46204
Telephone: (317) 632-5358

Attorney for Petitioner,
Van C. Vollmer and
The Indiana Investor and Business News, Inc.

Subscribed and sworn to before me this 12th day of June, 1971.

Alvene Coons

Alvene Coons, Notary Public

My commission expires:

November 12, 1974